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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 1019

THE CENTRAL NATIONAL BANK OF CLEVELAND, TRUSTEE,

Petitioner,

vs.

ROBERT O'BRIEN, EXECUTOR OF THE ESTATE OF JAMES O. MILLS, DECEASED.

BRIEF FOR ROBERT O'BRIEN, AS EXECUTOR OF THE WILL OF JAMES O. MILLS, DECEASED, CONTRA PETITION FOR WRIT OF CERTIORARI.

FRED C. RECTOR,
RICHARD T. RECTOR,
50 East Broad Street,
Columbus, Ohio,
Attorneys for O'Brien, as Executor.

CASE CITED

Page

Banana Sales Corporation v. *Chuchanis*, 119 O. S. 75. . 5

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The statement of the grounds on which the Common Pleas Court decided this case (Petitioner's Brief, p. 2) is neither complete nor correct. The issues in the case were in the main, if not entirely, of fact and the judgment in favor of the Executor resulted largely from the recognition by the State courts of the release given by The Smythe Building Company and The Central National Bank of Cleveland, as Trustee, petitioner herein, (R. p. 136), the validity of which release was challenged.

For a statement of the case for the Executor, see the third defense of the amended answer of the Executor beginning at Record, p. 61. See, also, statement of counsel made at the opening of the trial. (R. p. 105).

The case was first submitted to the Common Pleas Court, Judge Duncan presiding, and at the conclusion of the evidence offered by the plaintiff, the Court sustained the motion of the defendant, O'Brien, as Executor, for a judgment in his favor on the ground that it was not shown that there was any default on the part of The Smythe Building Company in the payment of its bonds and, therefore, there was no present right to resort to collateral. That was a sound position. In fact there is no such default. The record at that trial was largely made up of the statements by counsel of what were considered to be admitted facts.

An appeal was taken by the Trust Company to the Court of Appeals, where the judgment was reversed, principally because of the unsatisfactory record. That Court observed that it had searched the record but did not find evidence of the release above mentioned and in the opinion said: (R. p. 213).

> "It might be conceded that if all parties and interests including the holders of the bonds had voluntarily entered into an agreement to cancel the claim, that such an agreement would release the guarantor."

At the second trial in the Common Pleas Court, Judge Leach presiding, more evidence was introduced, including the release. (R. p. 136). Two questions of fact with respect to this release were presented, viz., first, whether there was any consideration for it, the Trust Company contending there was not, and, second, whether it was a voluntary release. Both these questions were decided

in favor of the Executor. Judgment was rendered for the Executor.

On appeal, that judgment was affirmed by the Court of Appeals. (R. p. 227).

The Supreme Court of Ohio denied an application to certify the record to that court and denied a rehearing thereon.

Before executing the release, the Trustee of the trust indenture submitted to the bondholders the advisability of approving the Plan of Reorganization and, for additional and valuable consideration, releasing The Mills-Cleveland Restaurant Company from all obligations to the Trustee and the lessor, The Smythe Building Company. Ninety per cent of the bondholders approved and none objected. (R. p. 142).

As aforesaid, it was contended by the Trust Company, or rather by Dorr E. Warner, the real party in interest herein, (R. p. 144), that there was no consideration for the release,—clearly a question of fact. Let us see what that consideration was.

Prior to the reorganization proceedings, the Trustee held no stock of The Mills-Cleveland Restaurant Company. In the settlement it demanded and received all of the stock of the reorganized Company, excepting one thousand shares of the common stock which were sold to Fred Simonsen, of Detroit, for $50,000, in cash, thus establishing a value for the common stock of $50 per share. The Trustee received, accordingly, sixteen hundred and twenty-five shares of the new preferred stock of the Restaurant Company, (the entire issue), having a par value of $100 per share, and five hundred shares of the new common stock of the Company, without par value, but of the actual value, as aforesaid, of $50 per share. In addition, all dividends on this stock were to be paid to the Trustee by the reorganized Restaurant

Company and put into the sinking fund for the retirement of The Smythe Building Company bonds.

If the value of the preferred stock is to be measured by that of the common, it is worth par.

Next, the Trustee was not willing to accede to the Plan of Reorganization or to execute the said release unless James O. Mills would agree to deposit with the Trustee bonds of The Smythe Building Company of the face value of $23,000 and consent that these bonds be subordinated to all other bonds with respect to the payment of interest and principal. This was done.

This voluntary contribution by James O. Mills must have been and was for the purpose of securing a complete release on the part of the Trustee of the claim for back rent due from The Mills-Cleveland Restaurant Company, on which he was guarantor, and all parties understood that, when this claim was released, Mills, likewise, was relieved of his guaranty. That is what he wished to accomplish for himself and that is what the Trustee and the bondholders intended he should have.

In addition to the above consideration, The Smythe Building Company got a new and extended lease from The Mills-Cleveland Restaurant Company, which would enable The Smythe Building Company to pay the interest and meet the sinking fund provisions for its bonds. The Mills-Cleveland Restaurant Company was its best tenant.

Furthermore, the tenant, The Mills-Cleveland Restaurant Company, paid all of its outstanding indebtedness in full in cash and had new capital furnished, in part, by the sale of its common stock in the amount of $50,000 and became a company in good operating condition.

All of this was in the end for the benefit of the bondholders, since the new lease from the Restaurant Com-

pany was deposited with the Trustee as additional collateral for the payment of the bonds.

As a further consideration for the release, Mills became a guarantor for the payment of the rent on the new Restaurant Company lease, something he did not have to do.

Furthermore, the Trustee demanded and received an order from The Smythe Building Company requiring the reorganized Restaurant Company to pay rent under the new lease directly to The Central National Bank of Cleveland, as Trustee. (R. p. 140, par. 5). Furthermore, a supplemental mortgage was executed in favor of the Trustee, as required by the Plan. (R. p. 146).

The United States Court evidently thoroughly understood this arrangement because in the final Report of the Debtor (R. p. 139) it was shown that: (R. p. 140)

> "On July 20th The Smythe Building Company and Central National Bank of Cleveland as Trustee, executed and delivered to the debtor" (The Mills-Cleveland Restaurant Company) "a release of all indebtedness owing by the debtor under the cancelled lease of March 1, 1932."

This Report was approved and confirmed by the Court. (R. p. 143). From this judgment, no appeal was taken.

We, therefore, conclude that the release by the plaintiff in this case was for an abundant and valuable consideration and brings the case under the rule of *Banana Sales Corporation* v. *Chuchanis*, 119 O. S. 75, the first syllabus of which is as follows:

> "If creditor accepts goods in full payment of a debt owing him by his debtor and executes a written release of the debt to the debtor, one who guarantees the payment of the debt is also released from his obligation as guarantor of the debt."

In the State courts Mr. Warner, with some show of sincerity, contended that the release executed by the Trust Company amounted merely to a receipt for the stock it received. That issue of fact was likewise decided in favor of the Executor.

It may not be successfully contended that there was any failure to recognize the decrees confirming the Plans of Reorganization of either the Restaurant Company or the Building Company. The State courts held that by both the Plans, which were fully carried out, and the voluntary release, the Restaurant Company (and, of course, Mills, the guarantor of rent), were fully released from the claim for rental on the 1932 lease. We have already pointed out the abundant consideration for the Plans of Reorganization and the voluntary release.

Opposite counsel would have this Court believe (Petitioner's Brief, p. 3) that the Executor relied only on the release set forth in the Plan of Reorganization. This is not a fair statement, as will appear from the third defense. (R. p. 61). The effect of the judgment of the State courts is to support entirely the third defense, (R. p. 61), wherein it conclusively appears that the Executor relied upon both the discharge contained in the Plan of Reorganization and the voluntary release. This overthrows the contention of opposite counsel (Petitioner's Brief, p. 8) that the State Court failed to give proper effect to the decree of the Federal Court.

The State courts gave full effect to the decrees confirming the Plans of Reorganization and, likewise, to the direction that a suit be filed to test the liability of Mills. Said courts entertained that suit and tried it and decided in favor of O'Brien, Executor.

Coming now to Paragraph 6 of the decree confirming the Master's Report in the reorganization of The Smythe

Building Company, we observe that it must have been inserted at the instance of Dorr E. Warner, attorney for one bondholder. (R. p. 145). (R. p. 193).

The Special Master reported (R. p. 126) that there was grave doubt as to whether the debtor "could collect the amount involved" from Mills. However, in the decree (R. p. 144) confirming the Master's Report and his findings of fact, it was provided that the liability of Mills, *if any*, might be tested by a suit against him by the Trustee. The Court already knew (R. p. 140) of the release executed to the Restaurant Company by the lessor, The Smythe Building Company, and The Central National Bank of Cleveland, as Trustee, and that the Plan contemplated the complete release of the Restaurant Company from the claim for rental upon the performance of the conditions therein set forth. There is no claim that these conditions were not fully met. *The Federal Court did not adjudge that there was any liability against Mills*, as it might have done, but, on the contrary, as shown by the Plans and decrees, must have concluded there was no such liability, since the principal debtor had been released.

Nevertheless, as may be inferred from the Record (R. pp. 144–5, and R. p.193) at the importunity of Mr. Warner, the Court permitted the filing of this suit against Mills, and, without authority, we insist, proceeded to attempt to make a contract for the Trustee, providing that Mr. Warner should have one-third of any amount recovered against Mills in this suit. The Trustee was certainly able to make its own contract with its counsel.

We rely on the analysis given by Judge Leach on this provision of the decree, as found in the Record, pp. 223–225.

How can it be said that the State Court did not give credit to any part of the judgment of the Federal

Court? It did not refuse to entertain this case *and the Federal Court directed nothing more than that the case should be filed and the question tried.* The case was filed and tried upon the facts, and the State courts found for the Executor. This was certainly giving full faith and credit by the State courts to the decrees of the United States Court.

The real complaint of Mr. Warner is that the State courts erred in their judgments upon the issues of fact. This Court will certainly not care to review questions of that kind. No Federal question appears.

The petition for certiorari should be denied.

Respectfully submitted,

FRED C. RECTOR,
RICHARD T. RECTOR,
Attorneys for O'Brien, as Executor.

50 East Broad Street,
Columbus, Ohio.